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McGeorge Law Review

Volume 16 | Issue 1

Article 8

1-1-1984

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Recommended Citation

Charles D. Cunningham Jr., *Vanishing Exception to the Psychotherapist-Patient Privilege: The Child Abuse Reporting Act*, 16 PAC. L. J. 335 (1984).

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Vanishing Exception to the Psychotherapist-Patient Privilege: The Child Abuse Reporting Act

Children have been physically injured, neglected, and molested by their guardians throughout history.¹ The problem of child abuse,² however, has been acknowledged only recently.³ Contrary to popular belief, child abuse is not limited to a particular class or sect.⁴ Abuse is not correlated with race, income level, or social background.⁵ The problem pervades the entire economic and social spectrum of our society.⁶

To protect abused children, those children first must be located.⁷ Legislatures in all fifty states have enacted provisions designed to identify and protect abused children.⁸ These laws often require specified

1. Brown, Fox & Hubbard, *Medical and Legal Aspects of the Battered Child Syndrome*, 50 CHI-KENT L. REV. 45, 53 (1974); Fraser, *A Glimpse at the Past, a Gaze at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI-KENT L. REV. 641, 641 (1978); Brown & Truitt, *Civil Liability in Child Abuse Cases*, 54 CHI-KENT L. REV. 753, 753 (1978); Harper, *The Physician, the Battered Child, and the Law*, 31 PEDIATRICS, 899, 900 (1963) (early recognition of child abuse).

2. Child abuse and neglect generally has been defined as the physical or mental injury, sexual abuse or exploitation, negligent treatment or maltreatment of a child by a person responsible for the child's welfare. See REPORT TO THE CONGRESS OF THE UNITED STATES, INCREASED FEDERAL EFFORTS NEEDED TO BETTER IDENTIFY, TREAT, AND PREVENT CHILD ABUSE AND NEGLECT, by the Comptroller General, U.S. GENERAL ACCOUNTING OFFICE 1 (April 29, 1980).

3. Smith, Berkman, & Fraser, *A Preliminary National Assessment of Child Abuse and Neglect and The Juvenile Justice System: The Shadows of Distress*, in REPORTS OF THE NATIONAL JUVENILE JUSTICE ASSESSMENT CENTERS, U.S. DEPT. OF JUSTICE, 2 (April 1980); Fraser, *supra* note 1, at 641. See Comment, *Reporting Child Abuse: When Moral Obligations Fail*, 15 PAC.L.J., 189, 189 (1983).

4. Comment, *The California Legislative Approach to Problems of Willful Child Abuse*, 54 CALIF. L. REV. 1805, 1806 (1966). See generally Gil, *The Incidence of Child Abuse & Demographic Characteristics of Persons Involved*, in THE BATTERED CHILD, 19-39 (1968).

5. Comment, *supra* note 4, at 1806; Steele & Pollack, *A Psychiatric Study of Parents Who Abuse Children and Small Infants*, in THE BATTERED CHILD, 89, 92-94 (1974).

6. See Gil, *supra* note 4, at 19-39; Steele and Pollack, *supra* note 5, at 92.

7. See REPORT TO CONGRESS, *supra* note 2, at 13; Brown & Truitt, *supra* note 1 at 760; Fraser, *supra* note 1, at 645.

8. Comment, *supra* note 3, at 189; Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103, 104 (1974); see J. COSTA & G. NELSON, CHILD ABUSE AND NEGLECT; LEGISLATION, REPORTING, AND PREVENTION (1978) (an explanation of these laws); see also P. DECOURCY, A SILENT TRAGEDY, CHILD ABUSE IN THE COMMUNITY, at 10-11 (1973). These legislative efforts came in response to strong public interest raised by a 1962 article that coined the term "battered child syndrome." Kempe, Silverman, Steele, Droegenmüller, & Silver, *The Battered Child Syndrome*, 181 J.A.M.A. 17 (1962).

individuals to report suspected abuse to child welfare agencies.⁹ Persons required by the statutes to report suspected abuse typically are professionals likely to come in contact with children.¹⁰ Psychotherapists¹¹ often are among those persons who have a duty to report.¹² Psychotherapists required, or desiring, to report abuse are always in a difficult position because their profession relies on confidentiality for successful treatment.¹³ To ensure confidentiality, communications between patients and psychotherapists generally are granted a privileged status in the law.¹⁴ The delicate balance between the interests in favor of reporting child abuse, and the privacy interests of psychiatric patients will be explored in this comment.

To accomplish this examination, this comment will begin by recognizing the general societal interest in obtaining all evidence relevant to legal actions.¹⁵ The concept of evidentiary privilege then will be discussed¹⁶, with particular emphasis on the interest of the state in protecting from disclosure the confidential communications between psychotherapists and their patients.¹⁷ A discussion of the reasons for recognizing a psychotherapist-patient privilege will be followed by an examination of the psychotherapist-patient privilege codified in California.¹⁸

After discussing the merits of the psychotherapist-patient privilege, this author will demonstrate that the privilege is flexible when competing state interests are deemed sufficient to outweigh the interests supporting the privilege.¹⁹ To accomplish this objective, the interests of the state in detecting and preventing child abuse will be examined.²⁰

9. See REPORT TO CONGRESS, *supra* note 2, at 3; COSTA & NELSON, *supra* note 8, at 17; see also CAL. PENAL CODE §§11165-11174 (child abuse reporting act).

10. REPORT TO CONGRESS, *supra* note 2, at 13; Fraser, *supra* note 1, at 645; Brown & Truitt, *supra* note 1, at 761, 762. Reporting statutes in most states require doctors to report suspected abuse because doctors are most likely to come in contact with abused children. *Id.*

11. CAL. EVID. CODE §1010 (definition of psychotherapist).

12. See REPORT TO CONGRESS, *supra* note 2, at 14.

13. See *infra* notes 41-48 and accompanying text.

14. See Ferster, *Statutory Summary of Physician-Patient Privileged Communication Laws*, in R. ALLEN, E. FERSTER, & J. RUBIN, READINGS IN LAW AND PSYCHIATRY, 161-65 (1968) (summary of privilege in 40 states).

15. Britt v. Superior Court, 20 Cal. 3d 844, 857, 574 P.2d 766, 774, 143 Cal. Rptr. 695, 703 (1978) cited with approval in Moskowitz v. Superior Court, 137 Cal. App. 3d 313, 316, 187 Cal. Rptr. 4, 6 (1982). The California courts have long recognized the historically important state interest in facilitating the ascertainment of truth in legal proceedings. *Id.* at 316, 187 Cal. Rptr. at 6. But see *infra* notes 30-31 and accompanying text.

16. See *infra* notes 32-48 and accompanying text.

17. See *infra* notes 39-48 and accompanying text.

18. See *infra* notes 37-48 and accompanying text. CAL. EVID. CODE §§1010-1028 (psychotherapist-patient privilege).

19. See *infra* notes 49-80 and accompanying text.

20. See *infra* notes 81-90 and accompanying text.

Specific attention will be devoted to the attempt of the California Legislature to promote the detection and prevention of child abuse through the Child Abuse Reporting Act.²¹ California has addressed the child abuse reporting problem by expressly exempting evidence of psychotherapists child abuse reports from the application of the psychotherapist-patient privilege.²²

The scope of this exemption recently was limited by the California Supreme Court in *People v. Stritzinger*.²³ In *Stritzinger*, the court held that a psychotherapist's testimony concerning his second report of suspected child abuse was inadmissible despite the fact that the Child Abuse Reporting Act exempts evidence of information reported pursuant to its provisions from the psychotherapist-patient privilege.²⁴ This comment will contend that the court construed the exemption more narrowly than intended by the California Legislature.²⁵ After a review of the holding in *Stritzinger*,²⁶ this author will conclude that legislative clarification is necessary to promote the intent of the legislature to exempt evidence of any reports of child abuse from the application of the psychotherapist-patient evidentiary privilege.²⁷ To support this conclusion, the interests of the state in detecting and preventing child abuse will be examined and weighed against the interests in support of maintaining the privacy of communications between psychotherapists and patients. In the investigation of this balancing of interests, the interests in favor of maintaining the confidentiality of psychotherapist-patient communications first will be examined.

THE PSYCHOTHERAPIST-PATIENT PRIVILEGE

According to Dean Wigmore, society is entitled to every person's evidence.²⁸ Each member of the community must sacrifice time, effort, and personal privacy to provide testimony necessary to learn

21. CAL. PENAL CODE §§11165-11174; see *infra* notes 91-112 and accompanying text.

22. CAL. PENAL CODE §11171(b) (privilege is inapplicable in any court proceeding to information reported pursuant to the Child Abuse Reporting Act).

23. 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).

24. 34 Cal. 3d at 514, 668 P.2d at 744, 194 Cal. Rptr. at 437. See CAL. PENAL CODE §11171(b).

25. See *infra* notes 140-56 and accompanying text.

26. See *infra* notes 122-42 and accompanying text.

27. See *infra* pages 36-37.

28. 8 J. WIGMORE, EVIDENCE §2192 (McNaughton rev. ed. 1961). "When we come to examine various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving. . ." *Id.* See also Ferster, *Confidential and Privileged Communications*, in R. ALLEN, E. FERSTER, & J. RUBIN, READINGS IN LAW AND PSYCHIATRY 154 (1968).

the truth in legal proceedings.²⁹ The legal system, however, has acknowledged certain situations or relationships in which community interests outweigh the need to disclose available evidence.³⁰ Consequently, various relationships have been granted a privileged status in the law, which enable a party to the relationship to prevent the disclosure of confidential communications occurring within the relationship.³¹

Privileges commonly are justified as promoting particular social goals, the importance of which supports the exclusion of even the most relevant evidence.³² Dean Wigmore established four conditions that a communication must meet to merit a privileged status:³³ (1) the communication must originate in confidence; (2) confidentiality must be essential to satisfactory maintenance of the parties' relationship; (3) the community must consider the relationship a proper one to foster; and (4) the injury to the relationship that would result from disclosure of the communication must outweigh the benefits of disclosure for the purposes of litigation.³⁴ Communications within the psychotherapist-patient relationship have been found to fulfill these requirements.³⁵

A. *The Evidentiary Privilege*

The California Legislature and judiciary have recognized the growing importance of the psychiatric profession in our modern, complex society.³⁶ Rapid economic and social changes produce extreme tensions.³⁷ The psychiatric profession is essential to the preservation of societal health and well-being since psychotherapy offers the poten-

29. J. WIGMORE, *supra* note 28.

30. Note, *Defendant v. Witness: Measuring Confrontation and Compulsory Process Rights Against Statutory Communications Privileges*, 30 STAN. L. REV. 935, 939 (1978); see J. WIGMORE, *supra* note 30, §2196. Aside from privileges, other existing evidentiary rules operate against the interests in obtaining the truth in legal proceedings. Note, *The Limits of Constitutional Privacy in the Psychotherapist-Patient Evidentiary Privilege—Analysis of the Patient-Litigant Exception*, 8 GOLDEN GATE L. REV. 55, 61 (1977). See *Weeks v. United States*, 232 U.S. 383 (1914) (application of the "Exclusionary Rule" in criminal cases); *Mapp v. Ohio*, 367 U.S. 643 (1961) (application of the "Exclusionary Rule" in criminal cases).

31. See, e.g., CAL. EVID. CODE §§950-962 (attorney-client privilege), 1030-1034 (clergyman-penitent privilege), 990-1007 (physician-patient privilege), 980-87 (marital privilege), 1010-1028 (psychotherapist-patient privilege).

32. Note, *Defendant v. Witness*, *supra* note 30, at 940, C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, §87, at 176 (2d ed. 1972).

33. J. WIGMORE, *supra* note 28, §2285.

34. *Id.*

35. *Slovenko, Psychiatry and A Second Look at the Medical Privilege*, 6 WAYNE L. REV. 175, 184-93 (1960).

36. *In re Lifschutz*, 2 Cal. 3d 415, 421, 467 P.2d 557, 560, 85 Cal. Rptr. 829, 832 (1970).

37. *Id.* at 421, 467 P.2d at 560, 85 Cal. Rptr. at 832.

tial for relief of these tensions.³⁸ Confidentiality is vitally important to the successful operation of psychotherapy.³⁹ The existence of a broad, protective psychotherapist-patient privilege evidences that California concurs in this view.⁴⁰

California Evidence Code section 1014 provides that a patient⁴¹ has a privilege to refuse to disclose, and to prevent others from disclosing, confidential communications⁴² between the patient and a psychotherapist.⁴³ The code sets forth in detail the nature of the communications that are to be privileged:

[I]nformation, including information obtained by an examination of the patient, transmitted between a patient and the psychotherapist in the course of the relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in the consultation, or those to whom disclosure is reasonably necessary for the . . . accomplishment of the purpose for which [the] psychotherapist is consulted.⁴⁴

If the patient, or someone else authorized or required to do so, claims this privilege, the patient's psychotherapist is obligated to remain silent.⁴⁵

The Legislature enacted the psychotherapist-patient privilege to encourage the effective treatment of mental illness and to protect the right of patients to privacy.⁴⁶ The courts, however, have held that this privilege is not absolute.⁴⁷ The privilege sometimes must yield to sufficiently compelling societal interests.⁴⁸

38. *Id.* at 421-22, 467 P.2d at 560, 85 Cal. Rptr. at 832.

39. T. GUTHEIL & P. APPELBAUM, *CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW*, 11 (1982) (essence of treatment rests on assumption of inviolate confidentiality); Ferster, *Confidential and Privileged Communications*, *supra* note 28, at 160; Slovenko, *supra* note 35, at 187-88.

40. See CAL. EVID. CODE §§1010-1028 (psychotherapist-patient privilege). It has been recognized that the privacy of communications between a patient and a psychotherapist has federal constitutional protection. *Smith v. Superior Court*, 118 Cal. App. 3d 136, 140, 173 Cal. Rptr. 145, 147 (1981); *In re Lifschutz*, 2 Cal. 3d 415, 431-32, 467 P.2d 557, 567-68, 85 Cal. Rptr. 829, 839-40 (1970). The California Constitution also gives general protection to the right of privacy. CAL. CONST. art.1 §1 (people have inalienable rights, among which is the right to pursue and obtain privacy).

41. CAL. EVID. CODE §1011 (definition of patient).

42. *Id.* §1012 (definition of confidential communication).

43. *Id.* §§1014 (privilege); 1010 (definition of psychotherapist).

44. *Id.* §1012.

45. *Id.* §§1014, 1015.

46. *Lifschutz*, 2 Cal. 3d at 432, 467 P.2d at 557, 85 Cal. Rptr. at 829; *Tarasoff v. Regents of University of California*, 17 Cal. 3d 425, 440, 551 P.2d 334, 346, 131 Cal. Rptr. 14, 26 (1976).

47. *Britt v. Superior Court*, 20 Cal. 3d 844, 848-49, 574 P.2d 766, 768, 143 Cal. Rptr. 695, 697 (1978); *Caesar v. Mountanos*, 542 F.2d 1064, 1067-68 (9th Cir. 1976); *Lifschutz*, 2 Cal. 3d at 432, 467 P.2d at 573, 85 Cal. Rptr. at 840.

48. *Britt*, 20 Cal.3d at 848-49, 574 P.2d at 768, 143 Cal. Rptr. at 697; *Caesar*, 542 F.2d

B. Limits on the Psychotherapist-Patient Privilege

In *In re Lifschutz*,⁴⁹ the California Supreme Court was asked to determine whether the psychotherapist-patient privilege may yield to important state interests.⁵⁰ In *Lifschutz*, a psychiatrist was placed in custody for refusing to obey a discovery order issued by the trial judge pursuant to California Evidence Code section 1016.⁵¹ California Evidence Code section 1016 contains the "patient-litigant exception" to the privilege. This section applies when, and to the extent that, the patient's emotional condition has been tendered by the patient as an issue in the litigation.⁵²

The psychiatrist in *Lifschutz* argued that the communications between himself and his patient were absolutely privileged.⁵³ The court, although acknowledging that most persons seeking psychotherapeutic treatment harbor justifiable expectations of confidentiality,⁵⁴ determined that not all "state interference" with this confidentiality is prohibited.⁵⁵ *Lifschutz* decided that the patient-litigant exception to the psychotherapist-patient privilege was justifiable in view of the substantial state interest in facilitating the ascertainment of truth in legal proceedings.⁵⁶ The court determined, however, that an exception could be justified only so long as it is tailored carefully and narrowly to serve important state interests.⁵⁷

In a more recent Ninth Circuit decision, *Caesar v. Mountanos*,⁵⁸ the court affirmed the *Lifschutz* conclusion that the psychotherapist-patient privilege is not absolute.⁵⁹ As in *Lifschutz*, the court found that the patient had triggered an exception⁶⁰ to the privilege by tender-

at 1068; *Lifschutz*, 2 Cal. 3d at 432, 467 P.2d at 573, 85 Cal. Rptr. at 840. California has made other statutory exceptions to the psychotherapist-patient privilege. See CAL. EVID. CODE, §§1016 (patient-litigant exception), 1018 (crime or tort), 1025 (proceedings to establish competency), 1027 (child patient under 16 years of age and the victim of a crime).

49. *Lifschutz*, 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).

50. *Lifschutz* was a suit for damages resulting from an alleged assault. During the course of a deposition, the plaintiff stated that he had received treatment from a psychiatrist approximately 10 years earlier. The psychiatrist, asserting the psychotherapist-patient privilege, refused to answer questions relating to his communications with the former patient. *Id.* at 420, 467 P.2d at 560, 85 Cal. Rptr. at 831.

51. *Id.* at 420-21, 467 P.2d at 560, 85 Cal. Rptr. at 831-32.

52. *Id.*

53. *Lifschutz*, 2 Cal. 3d at 423, 467 P.2d at 561, 85 Cal. Rptr. at 833.

54. *Id.* at 431, 467 P.2d at 567, 85 Cal. Rptr. at 839.

55. *Id.* at 432, 467 P.2d at 567, 85 Cal. Rptr. at 839.

56. *Id.* at 432, 467 P.2d at 568, 85 Cal. Rptr. at 840.

57. *Id.* at 434-35, 467 P.2d at 570, 85 Cal. Rptr. at 842-43.

58. 542 F.2d 1064 (9th Cir. 1976).

59. *Id.* at 1068.

60. CAL. EVID. CODE §1016 (patient-litigant exception).

ing her emotional condition as an issue in the case.⁶¹ The psychiatrist, however, refused to answer questions about the patient's condition, and argued that the exception was not supported by compelling state interests.⁶² The *Caesar* court disagreed, holding that the state has a compelling interest in ensuring that the truth is ascertained in legal proceedings, and that this interest supports the narrowly tailored exception at issue.⁶³ Thus, the psychotherapist-patient privilege was required to yield to important state interests.⁶⁴

The conclusion that the patient's right to privacy may yield in furtherance of compelling state interests has been reiterated by other recent California cases. In *Britt v. Superior Court*,⁶⁵ the defendant sought to inquire, through a barrage of interrogatories, into the plaintiffs' medical history.⁶⁶ The noise, vibrations, air pollution, and smoke associated with defendant's operation of an airfield as a facility for jet aircraft allegedly had caused numerous physical and mental injuries to the plaintiffs who were owners and residents of nearby homes.⁶⁷ The defendant sought a complete account of the plaintiffs' medical histories including all illnesses and mental disturbances.⁶⁸ The California Supreme Court determined that although a limited intrusion into the plaintiffs' privacy might be permissible, the defendant's requests were overly broad.⁶⁹ The court conceded, however, that the defendant could reframe his requests so as not to impinge improperly on the plaintiffs' privacy, thus demonstrating that disclosure was permissible under some circumstances.⁷⁰

Another case holding that a patient's right to privacy may yield

61. 542 F.2d at 1066-68.

62. *Id.* at 1069.

63. *Id.*

64. The court followed the rationale of the United States Supreme Court in two post-*Lifschutz* decisions: *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). As in *Lifschutz*, the privilege was determined to be a qualified right that could be infringed upon a showing of compelling state interests. 542 F.2d at 1067-68.

65. 20 Cal. 3d 844, 574 P.2d 766, 143 Cal. Rptr. 695 (1978).

66. *Id.* at 850, 574 P.2d at 769, 143 Cal. Rptr. at 698.

67. *Id.* at 849, 574 P.2d at 769, 143 Cal. Rptr. at 698.

68. *Id.* at 850, 574 P.2d at 769, 143 Cal. Rptr. at 698.

69. *Id.* at 864, 574 P.2d at 779, 143 Cal. Rptr. at 708.

70. *Id.* at 862 n.7, 575 P.2d 778 n.7, 143 Cal. Rptr. 707 n.7. The California Court of Appeal was faced with a similar situation under the physician-patient privilege in *Board of Medical Quality Assurance v. Gherardini* 93 Cal. App. 3d 669, 156 Cal. Rptr. 55 (1979). In *Gherardini*, the plaintiff sought medical records from the defendant hospital and its records custodian, Gherardini. *Id.* at 673, 156 Cal. Rptr. at 57. The records were sought by the plaintiff, a state agency, to substantiate allegations of incompetency against a particular doctor. *Id.* at 673, 156 Cal. Rptr. at 57. The court reiterated the standard for justifying intrusion into individual privacy, that intrusion must be excused by compelling state interests. *Id.* at 680, 156 Cal. Rptr. at 61. The court determined that the interests of the state in maintaining

in furtherance of compelling state interests is *Jones v. Superior Court*.⁷¹ The California Court of Appeal, in *Jones*, followed the *Lifschutz* rationale and agreed that privacy interests must be weighed against the legitimate interests of the real parties in the litigation.⁷² In *Jones*, the plaintiff claimed injury as a result of her mother's ingestion of the drug diethylstilbestrol (DES) while the plaintiff was *in utero*.⁷³ The defendant sought information concerning the medical history of the plaintiff's mother.⁷⁴ As in *Lifschutz* and *Caesar*, the patient had disclosed a significant portion of the protected information which triggered an exception to the privilege.⁷⁵ The court held that the privilege was inapplicable to those issues previously disclosed by the patient.⁷⁶ All other information, however, remained within the protection of the privilege.⁷⁷

As is apparent from each of these California decisions, the psychotherapist-patient privilege is recognized to be conditional, and may be outweighed in certain situations by compelling state interests if the intrusion is tailored narrowly to further the specific interests of the state.⁷⁸ A particular statutory exception to the privilege that represents strong state interests can be found in the Child Abuse Reporting Act⁷⁹ of California.

CHILD ABUSE REPORTING

Child abuse is recognized as one of the most serious social problems in this country.⁸⁰ A 1982 study of abused children estimated that up to fourteen percent of all children in the country were being abused.⁸¹ The likelihood that this is a conservative estimate was

quality medical care were important public concerns, but disallowed disclosure because the plaintiff's inquiries were overly broad, seeking to expose the medical histories of patients with no showing that these records were material to the investigation. *Id.* at 681, 156 Cal. Rptr. at 62.

71. 119 Cal. App. 3d 534, 174 Cal. Rptr. 148 (1981).

72. *Id.* at 550, 174 Cal. Rptr. at 157-58.

73. *Id.* at 540, 174 Cal. Rptr. at 152.

74. *Id.* at 550, 174 Cal. Rptr. at 157-58.

75. *Id.* at 551, 174 Cal. Rptr. at 158. In *Lifschutz*, the patient had triggered the "patient-litigant" exception. See CAL. EVID. CODE §1016, and *supra* notes 53-58 and accompanying text.

76. *Id.* at 551, 117 Cal. Rptr. at 158.

77. *Id.* at 551, 117 Cal. Rptr. at 158.

78. See *McKirdy v. Superior Court*, 138 Cal. App. 3d 12, 19, 188 Cal. Rptr. 143, 148 (1982) (recognition of the concept that the privilege is conditional and may give way to compelling state interests).

79. See generally CAL. PENAL CODE §§11165- 11174.

80. See generally, Gil, *supra* note 4, 19-39 (demographics); Toro, *Developmental Effects of Child Abuse: A Review*, in 6 CHILD ABUSE AND NEGLECT, 423, 423-31 (1982); Straus, *Stress and Physical Child Abuse*, 4 CHILD ABUSE AND NEGLECT, 75, 75-88 (1980); Fleshback, *The Effects of Violence in Childhood*, 2 J. CLINICAL CHILD PSYCHOLOGY, 28 (1973).

81. Toro, *supra* note 80, at 424. See D. GIL, VIOLENCE AGAINST CHILDREN: PHYSICAL CHILD

conceded.⁸² Significant underreporting of instances of child abuse is one of the most troubling aspects of this problem.⁸³ For a number of reasons, cases of abuse seldom are reported. One reason frequently cited is that the victims generally are too young to report the incidents themselves.⁸⁴ Underreporting also occurs because usually only the immediate family witnesses the abuse.⁸⁵ To prevent further child abuse, suspected abuse must be brought to the attention of the authorities as soon as possible.⁸⁶ Inflicted injuries often are serious and generally occur in repeating patterns of abuse.⁸⁷ Thus, children are considered to be in danger while they remain in the custody of their abusers.⁸⁸

In 1963, California became the first state to enact legislation *requiring* specified persons to report suspected child abuse.⁸⁹ Several amendments strengthened and broadened the law,⁹⁰ evidencing the enduring interest of the legislature in curbing the incidence of child abuse.⁹¹ Most of these amendments expanded the list of persons required to report suspected abuse.⁹²

In 1980, California repealed the existing law on child abuse and enacted the Child Abuse Reporting Act⁹³ (hereinafter referred to as

ABUSE IN THE U.S. (1970); STRAUS, *supra* note 80 (an analysis of the breadth of child abuse). In 1977, there were approximately 70,000 cases of child abuse reported in California alone. Press Release, California Senator Omer L. Rains, April 25, 1979, at 1 (copy on file at *Pacific Law Review*).

82. Toro, *supra* note 80, at 424; *see also* Starr, Child Abuse 34 AM. PSYCHOLOGY 872-78 (1979) (likelihood that all estimates of the incidence of child abuse are conservative).

83. Starr, *supra* note 82, at 872-78; Toro, *supra* note 80, at 424.

84. Comment, *supra* note 4, at 1807; Fraser, *supra* note 1, at 679.

85. Comment, *supra* note 4, at 1807; Fraser, *supra* note 1, at 679.

86. *Landeros v. Flood*, 17 Cal. 3d 399, 412 n.9, 551 P.2d 389, 395 n.9, 131 Cal. Rptr. 69, 75 n.9 (1976) (citing Kempe, *supra* note 8, and Boardman, *A Project to Rescue Children from Inflicted Injuries*, 7 Soc. WORK 43, 49 (1962)).

87. *Landeros*, 17 Cal. 3d at 412, 551 P.2d at 395, 131 Cal. Rptr. at 75; *see also* Brown & Truitt, *supra* note 1 at 755.

88. *Landeros*, 17 Cal. 3d at 412, 551 P.2d at 395, 131 Cal. Rptr. at 75.

89. 1963 Cal. Stat. c. 576, §1, at 1453 (enacting the reporting act); *see* Harper, *supra* note 1 at 900.

90. *See* 58 OPS. CAL. ATT'Y GEN. 824, 826 (1975). "Through several amendments, section 11161.5 has evolved into a comprehensive reporting statute aimed at increasing the number and types of child abuse cases reported. In seeking this objective, the Legislature has greatly increased and diversified the groups of persons upon whom a duty rests to report. . . . It has also added to the types of harm which should be reported, provided alternatives to reporting to police, and immunized the reporting persons from [potential] civil or criminal liability resulting from [making a report]." *Id.*

91. *Id.* *See* 1982 Cal. Stat. c. 1398, §1, at 1134 (Legislature asserts that children are a precious resource, and recognizes that abused children are prone to commit crimes as adults).

92. *See* 1979 Cal. Stat. c. 373, §251, at 1357 (persons required to report suspected abuse included dentists, doctors, nurses, teachers, chiropractors, and school principals).

93. CAL. PENAL CODE §§11165-11174; *see also* *Review of Selected 1980 California Legislation*, 12 PAC. L.J. 475 (1981).

the Act). The Legislature asserted that the intent of the Act was to clarify the duties and responsibilities of persons required to report child abuse.⁹⁴ Moreover, the Legislature encouraged county welfare or probation departments to act promptly in assessing each report of abuse to determine (1) the composition of the household; (2) whether reason exists to believe that any child is being abused, and if so, the person responsible; (3) the risk to each child entailed by remaining in the existing environment; and (4) the action that appears necessary to help prevent further abuse.⁹⁵

Specifically, the Act requires specified professionals,⁹⁶ including psychotherapists,⁹⁷ to report⁹⁸ known or suspected instances of child abuse⁹⁹ if they have, in their professional capacities or within the scope of their employments, at least a reasonable suspicion that a child has been *physically* abused.¹⁰⁰ The reports must be made as soon as possible by telephone, and must be followed by written reports.¹⁰¹ Furthermore, the Act provides that these professionals *may* report suspected or known abuse when they know or reasonably suspect that a child's *emotional* well-being is endangered in any way.¹⁰² All unspecified or lay persons *may* report when they have knowledge of a child who they reasonably suspect has been abused.¹⁰³ By providing for *optional* reporting, the Act represents a departure from prior law wherein all reports were *required* to be made.¹⁰⁴ Individuals who report child abuse are granted immunity by the Act from any potential civil or criminal liability.¹⁰⁵ Moreover, the Act removes all information reported pur-

94. See 1980 Cal. Stat. c. 1071 §5, at 3425.

95. *Id.*

96. The Act requires "any child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency" to report known or suspected abuse. CAL. PENAL CODE §11166(a).

97. The Act requires medical practitioners to report suspected abuse. *Id.* "Medical practitioner" is defined to include psychologists. *Id.* §11165(i). The definition of "psychologists" includes "psychotherapists". CAL. BUS. & PROF. CODE §2902(c).

98. Reports are to be made to child protective agencies. CAL. PENAL CODE §11166(a). See *Id.* §11165(k) (definition of child protective agency).

99. Child abuse includes any injury inflicted by other than accidental means on a child under the age of eighteen. CAL. PENAL CODE §11165(a)(g). Child abuse may take the forms of sexual assault, neglect, willful cruelty, unjustifiable punishment, corporal punishment or injury, or abuse in out-of-home care. *Id.* § 11165(b)-(f).

100. CAL. PENAL CODE §11166(a) (mandatory reporting provision). Failure to make required reports constitutes a misdemeanor. *Id.* §11172(b).

101. *Id.* §11166(a). Written reports must be sent within 36 hours after receiving the information concerning the abuse. *Id.*

102. *Id.* §11166(b) (optional reporting); 65 OPS. CAL. ATT'Y GEN. 335, 336 (1982).

103. CAL. PENAL CODE §11166(c) (optional reports); 65 OPS. CAL. ATT'Y GEN. 335, 336 (1982).

104. Compare CAL. PENAL CODE §11166(a)-(c), with 1979 Cal. Stat. c. 373, §251, at 1357 (amending CAL. PENAL CODE §11161.5).

105. CAL. PENAL CODE §11172(a).

suant to its provisions from the application of the physician-patient privilege and the psychotherapist-patient privilege.¹⁰⁶

By augmenting the methods in which reports of child abuse may be received, the California Legislature has broadened the child abuse reporting law. The Act not only *requires* certain individuals to report physical abuse, but provides that they *may* report suspected emotional abuse.¹⁰⁷ This allows a psychotherapist to report abuse even when he is not required to do so.¹⁰⁸ Additionally, the Legislature has removed all doubt about the importance of reporting child abuse by asserting that reports made to carry out its intentions are exempted from the application of certain evidentiary privileges.¹⁰⁹ These changes evidence a strong state interest in detecting and preventing child abuse. What now must be determined is the extent to which confidential communications may be disclosed to achieve the purposes of the Act.

MESHING OF THE PSYCHOTHERAPIST-PATIENT PRIVILEGE WITH THE CHILD ABUSE REPORTING ACT

The California Evidence Code provides that a patient has a privilege to maintain the privacy of confidential communications between the patient and a psychotherapist.¹¹⁰ Confidential communications between a psychotherapist and a patient are protected to encourage those who may pose a threat to themselves or others, because of some emotional or mental disturbance, to seek professional assistance.¹¹¹ For psychotherapy to be productive, an atmosphere of confidentiality is essential.¹¹² A patient would be disinclined to disclose details of his personal life without assurance that those details would remain private.¹¹³

Notwithstanding the importance of privileges, the judicial system has recognized that the existence of a privilege may not bar evidence of confidential communications in all situations.¹¹⁴ In these situations, compelling state interests in favor of disclosure may outweigh the privacy interests of the patient.¹¹⁵ When the state seeks to justify

106. *Id.* §11171(b).

107. *Id.* §11166(a),(b),(c).

108. *Id.* §11166(b).

109. *Id.* §11171(b).

110. CAL. EVID. CODE §1014. *see supra* notes 41-48 and accompanying text.

111. *Grosslight v. Superior Court*, 72 Cal. App. 3d 502, 507-8, 140 Cal. Rptr. 278, 281 (1977); *Lifschutz*, 2 Cal. 3d at 421-22, 467 P.2d at 560, 85 Cal. Rptr. at 832.

112. *Grosslight*, 72 Cal. App. 3d at 507-08, 140 Cal. Rptr. at 281.

113. *Id.* at 507, 140 Cal. Rptr. at 281.

114. *See supra* notes 47-79 and accompanying text.

115. *See Id.*

disclosure of a patient's confidential communications, the interests of the state in favor of the disclosure must be evaluated and balanced against the patient's interest in privacy.¹¹⁶ As stated by the Legislature in the Act, the interests of the state in favor of disclosing confidential communications are the interests in detecting and preventing the crime of child abuse.¹¹⁷ The Legislature determined that these interests, in addition to the interest of the state in gathering all relevant facts in legal proceedings, are sufficient to outweigh the interests in keeping evidence of confidential communications between patients and psychotherapists privileged from disclosure.¹¹⁸ The Act removes all doubt of this by *expressly* exempting from the application of the privilege evidence of information reported pursuant to the Act.¹¹⁹ The extent to which evidence of reports of child abuse may be excluded from the privilege, however, has been narrowly defined by the California Supreme Court in a recent decision.¹²⁰ This comment will examine that California Supreme Court decision, and establish that the opinion does not give full effect to the legislative intent of the Act.¹²¹

A. *People v. Stritzinger*

In 1983, the California Supreme Court, in *People v. Stritzinger*,¹²² was confronted with a conflict between the Child Abuse Reporting Act and the psychotherapist-patient privilege. The defendant contended, *inter alia*, that his psychotherapist-patient privilege had been violated by certain evidentiary rulings made by the trial court, which admitted evidence of his psychotherapist's report.¹²³ The court examined the exception to the privilege provided by the Act, and accepting defendant's arguments, held that the doctor's testimony should have been excluded.¹²⁴

The defendant, Stritzinger, was accused of engaging in various sex acts with his minor stepdaughter, Sarah, during a fifteen-month period

116. See *id.* As previously noted, the patient's right to privacy is protected by article 1, section 1 of the California Constitution. This provision, however, does not prohibit all invasions of a person's privacy, but rather requires that all invasions be justified by compelling state interests. 65 OPS. CAL. ATT'Y GEN. 335, 344 (1982). The right to privacy was initially given federal constitutional recognition in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

117. See 1980 Cal. Stat. c. 1071, §5, at 3425 (enacting CAL. PENAL CODE §§11165-11174).

118. These interests are considered "compelling". *People v. Stritzinger*, 34 Cal. 3d 505, 511-12, 668 P.2d 738, 742-43, 194 Cal. Rptr. 431, 435-36 (1983).

119. CAL. PENAL CODE §11171(b).

120. *Stritzinger*, 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983).

121. See *infra* notes 122-60 and accompanying text.

122. 34 Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431.

123. *Id.* at 510, 668 P.2d at 742, 194 Cal. Rptr. at 435.

124. *Id.* at 513, 514, 668 P.2d at 743, 744, 194 Cal. Rptr. at 436-38.

ending in May 1981.¹²⁵ When defendant's wife, Sarah's mother, heard of these occurrences from Sarah, she arranged for Sarah and Stritzinger to see a licensed clinical psychologist, Dr. Walker. During her visit on July 28, 1981, Sarah declared that she had engaged in sexual activities with her stepfather.¹²⁶ That same afternoon, Dr. Walker reported what Sarah had told him to a child welfare agency, as he was required to do by the Act.¹²⁷ The child welfare agency relayed this report to the sheriff's office. On the following day, July 29, a sheriff's deputy telephoned Dr. Walker to investigate the report.¹²⁸ The doctor recounted the matter and informed the deputy that he was scheduled to counsel the defendant in a subsequent session.¹²⁹

During Dr. Walker's session with Stritzinger on July 29, Stritzinger confirmed Sarah's allegations. The investigating officer telephoned Dr. Walker the following day to inquire further about the case of child abuse alleged by Sarah. The officer read the exception to the psychotherapist-patient privilege expressed in the Act¹³⁰ because the doctor was reluctant to disclose the defendant's confidential statements.¹³¹ Dr. Walker then corroborated his earlier report by relating the substance of his discussion with Stritzinger.¹³² The doctor was allowed to testify at trial to the substance of these communications.

In response, the defendant moved to exclude Dr. Walker's testimony on the basis of the psychotherapist-patient privilege.¹³³ The trial court admitted the evidence, however, holding that the Act provided an applicable exception to the privilege.¹³⁴ On appeal, Stritzinger reiterated the argument that Dr. Walker's testimony should have been excluded at trial because of the psychotherapist-patient privilege.¹³⁵ Stritzinger

125. *Id.* at 509, 668 P.2d at 741, 194 Cal. Rptr. at 434. Sarah turned 14 on July 13, 1980. *Id.* at 509 n.1, 668 P.2d 741 n.1, 194 Cal. Rptr. at 434 n.1.

126. *Id.* at 509, 668 P.2d at 741, 194 Cal. Rptr. at 434.

127. *Id.* at 509, 668 P.2d at 741, 194 Cal. Rptr. at 434; CAL. PENAL CODE §11166(a) (mandatory reporting provision). The privilege was inapplicable to Sarah's confidential communications because the California Evidence Code removes the privilege when, as here, the patient is less than 16 years old and the doctor has reason to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interests of the child CAL. EVID. CODE §1027.

128. 34 Cal. 3d at 510, 668 P.2d at 741, 194 Cal. Rptr. at 434.

129. *Id.* at 510, 668 P.2d at 741, 194 Cal. Rptr. at 434.

130. CAL. PENAL CODE §11171(b).

131. 34 Cal. 3d at 509, 668 P.2d at 741, 194 Cal. Rptr. at 434. The officer read, substantially verbatim, California Penal Code Section 11171(b) (exclusion of child abuse reports from the psychotherapist-patient privilege).

132. 34 Cal. 3d at 509, 668 P.2d at 741, 194 Cal. Rptr. at 434.

133. *Id.* at 510, 668 P.2d at 741, 194 Cal. Rptr. at 434.

134. *Id.*

135. *Id.*

contended that on the facts of his case, the exception to the psychotherapist-patient privilege provided by the Act was inapplicable.¹³⁶

Specifically, the *Stritzinger* court held that Dr. Walker's report of his session with Sarah was admissible under a statutory exception to the privilege.¹³⁷ The majority reasoned that by making his initial report, the doctor had "satisfied his statutory reporting obligation" and was not *required* to make subsequent reports of the same abuse.¹³⁸ The court held that evidence of the doctor's second report was not exempted from the privilege because he was under no duty to make the report.¹³⁹

The *Stritzinger* court acknowledged that the interests of the state in deterring, detecting, and preventing the crime of child abuse were compelling.¹⁴⁰ The court construed the exception to the psychotherapist-patient privilege narrowly, however, and interpreted the Act as a legislative declaration that only evidence of required reports of abuse was to take precedence over the privilege.¹⁴¹ By so doing, the court effectively limited the privilege exemption expressed in the Act to *obligatory* reports, and apparently, excluded from the exemption evidence of any reports *authorized, but not required*, by the Act.¹⁴²

The dissenting opinion by Justice Richardson in *Stritzinger* contended that Dr. Walker's report of the defendant's communications fell within the exception found in the Act, and consequently, evidence of that report should have been admitted.¹⁴³ Justice Richardson argued that the doctor's report was at least *permitted* by the Act, if not required.¹⁴⁴ Moreover, Justice Richardson believed that the Legislature intended to exempt *any* report of child abuse from the privilege.¹⁴⁵

Absent an applicable exception, the defendant's conversations with the doctor were privileged from disclosure by the psychotherapist-

136. *Id.* at 512, 668 P.2d at 743, 194 Cal. Rptr. at 436.

137. The court held that this report fell within the exception of the psychotherapist-patient privilege for "minor patients believed to be the victim of a crime." *Id.* at 513, 668 P.2d at 743-44, 194 Cal. Rptr. at 436-37. See CAL. EVID. CODE §1027.

138. 34 Cal. 3d at 514, 668 P.2d at 744, 194 Cal. Rptr. at 437. The court did, however, state that the doctor would have been *required* to report had he learned of child abuse in *addition* to or *different* than that he previously had reported. *Id.* at 514, 668 P.2d at 744, 194 Cal. Rptr. at 437.

139. *Id.* at 513-14, 668 P.2d at 744, 194 Cal. Rptr. at 437. See CAL. PENAL CODE §11171(b) (psychotherapist-patient privilege).

140. 34 Cal. 3d at 511-12, 668 P.2d at 743, 194 Cal. Rptr. at 436.

141. *Id.* at 513-14, 668 P.2d at 744, 194 Cal. Rptr. at 437.

142. *Id.*

143. *Id.* at 526-27, 668 P.2d at 753, 194 Cal. Rptr. at 446.

144. *Id.* at 527, 668 P.2d at 753, 194 Cal. Rptr. at 446.

145. *Id.*

patient privilege.¹⁴⁶ If the Legislature intended the exception in the Act to apply to evidence of reports such as the one made by the doctor, intrusion into the defendant's privacy was justified. As has been shown, the interests of the state in this situation are compelling.¹⁴⁷ As will be reasoned, the Legislature intended evidence of all legitimate reports of child abuse to be exempted from the privilege. This comment contends that the majority of the *Stritzinger* court interpreted the exemption in the Act more narrowly than the Legislature intended, and that the Legislature must respond with clarifying legislation. Furthermore, the Act is a penal law intended to provide a specific exception to the psychotherapist-patient privilege so that incidents of child abuse can be investigated properly, and so that the perpetrators can be prosecuted. The narrow ruling of the court makes successful prosecution virtually impossible in situations similar to *Stritzinger* by barring from evidence the admissions of the perpetrator.¹⁴⁸

B. *The Effects of Stritzinger*

Without equivocation, the Act provides that the psychotherapist-patient privilege is inapplicable to information reported *pursuant to* the Act.¹⁴⁹ Thus, a court finding information to have been reported pursuant to the Act would be obliged to admit evidence thereof despite its confidential character.¹⁵⁰ In the context of the *Stritzinger* case, Dr. Walker's supplemental report of his meeting with Stritzinger was made according to the provisions of the Act.¹⁵¹ As a result, the report was not privileged, and the doctor should have been allowed to testify about its contents.¹⁵² As has been shown, the Act contains both man-

146. CAL. EVID. CODE §1014 (privilege).

147. See *supra* notes 118-119 and accompanying text.

148. In *Stritzinger*, the evidence given by the doctor relating the victim's allegations could not have been used to convict the defendant because of its hearsay nature. See CAL. EVID. CODE §1200 (hearsay rule). Contrast the evidence given by the doctor relating the defendant's admissions, which would survive a hearsay objection by fitting within the exception for admissions by a party to the action. See *id.* §1220 (admissions exception to the hearsay rule).

149. CAL. PENAL CODE §11171(b).

150. Courts are bound to give effect to the ordinary meaning of words in a statute "unless otherwise clearly indicated." *Alpha Beta Acme Mkts., Inc. v. City of Whittier*, 262 Cal. App. 2d 16, 21, 68 Cal. Rptr. 327, 331 (1968); *Lundak v. Bd. of Retirement*, 142 Cal. App. 3d 1040, 1048, 191 Cal. Rptr. 446, 451 (1983); *Sinnamon v. McKay*, 142 Cal. App. 3d 847, 850-51, 191 Cal. Rptr. 295, 297 (1983).

151. A report made "pursuant to" the provisions of the Act is one made "according to", or "to carry out", the provisions of the Act. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1848 (1976).

152. "The court must adopt the interpretation of the statute that will carry out the apparent purpose of the statute." *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 88 Cal. App. 3d 43, 53, 152 Cal. Rptr. 153, 160 (1979); *McKee v. Commission on Professional Competence*, 114 Cal. App. 3d 718, 724, 171 Cal. Rptr. 81, 84 (1981).

datory and optional reporting sections.¹⁵³ Dr. Walker's report could have been classified properly within either of these sections of the Act.

The doctor's report concerning his session with the defendant reasonably could have been classified within the permissive reporting section of the Act¹⁵⁴ which allows a report when the medical practitioner knows or suspects that a child's emotional well-being is endangered in any way.¹⁵⁵ Dr. Walker reasonably could have believed that Stritzinger's actions toward Sarah were endangering her emotional well-being.¹⁵⁶ Thus, the doctor could have reported his suspicions under the optional reporting section of the Act, even though he previously had satisfied his statutory obligation to report. The *Stritzinger* court, however, did not explore Dr. Walker's beliefs, which rendered moot the optional reporting section as a basis for finding that the doctor's report was made pursuant to the Act. The doctor's report, after his session with Stritzinger, also could have been considered to be required by the statute. If the report was required, evidence of the doctor's report should have been admissible even within the narrow construction given the Act by the court.

The record of the *Stritzinger* case shows that Sarah's mother sent Sarah and Stritzinger to Dr. Walker for the purpose of ascertaining the truth of Sarah's assertions regarding sexual encounters on different occasions involving Sarah and Stritzinger, a neighbor boy, and a shepherd.¹⁵⁷ Dr. Walker's testimony about his communications with the defendant was crucial to corroborate what otherwise might be considered products of the imagination of a young child.¹⁵⁸ A corroborative report, such as this one, is especially important on the *Stritzinger* facts where physical evidence of the abuse involved in unavailable, and the victim's allegations cannot be substantiated without the therapist's testimony concerning the defendant's confidential statements.

153. One of the sections is a mandatory reporting provision, the others are permissive provisions. CAL. PENAL CODE §11166(a), (b), (c). See *supra* notes 96-104 and accompanying text.

154. CAL. PENAL CODE §11166(b).

155. *Id.*

156. The psychological damage done to abused children may be more serious than any physical harm. Littner, *What is Known About Child Abusers*, in CHILD ABUSE: PRESENT AND FUTURE 73 (1975); Fraser, *supra* note 1, at 655; MacFarlane, THE MENTAL HEALTH OF THE CHILD-PROJECT REPORTS, CHILDHOOD INFLUENCES UPON INTELLIGENCE, PERSONALITY, AND MENTAL HEALTH, NATIONAL INST. OF MENTAL HEALTH 131 (1971). There is substantial evidence that a child's emotional damage can be crippling and permanent. Wald, *State Intervention on Behalf of Endangered Children - A Proposed Legal Response*, 6 CHILD ABUSE AND NEGLECT 3, 13 (1982 Kempe, ed.).

157. 34 Cal. 3d at 520, 668 P.2d at 749, 194 Cal. Rptr. at 442.

158. Justice Richardson recognized this fact in his dissent. *Id.* at 527, 668 P.2d at 754, 194 Cal. Rptr. at 447.

In factual situations similar to the *Stritzinger* case, in which the abused child was unavailable to testify against the abuser, evidence given by a doctor of the defendant's admissions may be the only admissible evidence of guilt. Evidence of the defendant's admissions are admissible under an exception to the hearsay rule for admissions by a party to the action, whereas evidence of the victim's allegations fits no such exception, and would therefore be inadmissible.¹⁵⁹

The express terms of the exception to the psychotherapist-patient privilege fully express the intent of the Legislature. Since the Act not only requires certain persons to report, but states that they *may* report, the Legislature seemingly could not have worded the exemption any more clearly than to say that information reported pursuant to the Act is unaffected by the psychotherapist-patient privilege.

The *Stritzinger* court, however, has interpreted the exemption to apply only to mandatory reports.¹⁶⁰ This holding indicates that clarification is warranted to further the interests of the state in protecting children from abuse and in prosecuting the abusers. This clarification is essential in light of the importance of detecting and preventing child abuse.

A LEGISLATIVE PROPOSAL

Based on the above analysis, the proposed legislative clarification is necessary for the exemption in the Act to have the broad effect intended. Evidence of *all* reports *authorized* by the Act must be beyond the application of the privilege. When providing that certain individuals, including psychotherapists, *may* report suspected abuse, the Legislature must also have intended that evidence of these reports would be exempted from the privilege. The Legislature must amend the language of the exception to the privilege, to clarify the intent that evidence of all reports of child abuse is to be excluded from the application of the psychotherapist-patient privilege.

159. See CAL. EVID. CODE §§1200 (hearsay rule), 1220 (exception to hearsay rule for admission by a party).

160. Although the court limits the exception in the Act, the court does not affect a different exception to the privilege that could apply in certain instances. This exception renders the privilege inapplicable if the psychotherapist has reason to believe that (1) the patient is potentially dangerous to the person of another, and (2) disclosure of the communication is necessary to prevent the threatened danger. See CAL. EVID. CODE §1024. If a psychotherapist learns from the patient that the patient *has* abused a child, the psychotherapist could justifiably infer that the child is in danger of *future* abuse because it is generally accepted that abuse is an on-going phenomenon occurring over periods of time. See, Brown & Truitt, *supra* note 1, at 755; Fontana, *The "Maltreatment Syndrome" in Children*, 269 NEW ENG. J. MED. 1389, 1393 (1963), *Landeros*, 17 Cal. 3d at 412, 551 P.2d at 395, 131 Cal. Rptr. at 75.

To achieve the objects of the Act, the exception, section 11171(b) of the California Penal Code, should be amended to state that evidence of *both required and optional* reports is encompassed within the exception. The section then would read: "Neither the physician-patient privilege nor the psychotherapist-patient privilege shall apply to *any* information reported pursuant to the *mandatory or optional* reporting provisions of this article." This minor change would suffice to give this exception the broad coverage that the reporting of child abuse requires.

CONCLUSION

This comment has recognized the interest of the state in protecting the confidential communications of patients and psychotherapists. The privileged status that this relationship enjoys, however, has been shown to be conditional rather than absolute. The interests of the state in detecting and preventing child abuse, and in prosecuting the perpetrators, are very important, as demonstrated by the language of the Child Abuse Reporting Act. These interests are sufficiently compelling to outweigh the interests in keeping communications confidential.

The Act states that the psychotherapist-patient privilege is inapplicable to reports of abuse made *pursuant to* the Act.¹⁶¹ Since the privilege itself is a legislative creation, the Legislature has the power to make that exclusion. The Act not only *requires* specified individuals to report abuse, but states that they *may* report certain instances of abuse. Therefore, the Act intends evidence of both types of reports to be exempted from the privilege. This conclusion is supported by the fact that the Legislature did not limit the exception to one type of report or the other.¹⁶²

Legislative efforts in the direction of eradicating the child abuse problem have been hampered by the narrow construction given the exemption in the Act. This comment has demonstrated that a response from the Legislature is warranted to clarify that the privileged status of confidential communications between patients and psychotherapists should not bar evidence of child abuse reports. The proposed amendment, if enacted, would accomplish this clarification.

Charles D. Cunningham, Jr.

161. CAL. PENAL CODE §11171(b).

162. See CAL. PENAL CODE §11171(b).